

Introductory Comments of Former Commissioner Henry Rivera**RECEIVED**

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FEDERAL COMMUNICATIONS COMMISSION
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Good morning, Mr. Chairman, Commissioners. It is a pleasure to be here but I have to admit that it's an odd feeling being on this side of the dais. I have been given the job of providing a brief history of these important regulations. And, speaking of history, I gather we are making it today by participating in this unique en banc hearing that brings together representatives from cable, broadcasting and the public -- supporters and opponents of EEO regulation.

My own history with these rules began almost immediately upon my arrival at the Commission. I can assure you that when I came to the FCC, it was not with the intention of being the focal point of EEO efforts at that time. However, as my tenure unfolded, I encountered a large number of people who went out of their way to tell me how important these rules were, how their careers in the media were attributable directly to these rules and how important it was that they be preserved. And as Commissioner Copps has just pointed out, many people told me how important these rules were in their efforts to become media owners.

Time does not permit me to recite a comprehensive history of 35 years of FCC EEO regulation or list all the Chairmen, Commissioners and General Counsels who have been committed to these rules but I commend that history to you. Some of the names on that list might surprise you. The jurisprudential background is already in the record of this

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docket. So, I will focus on how these rules came to be adopted, and on how they were called into question.

The Commission's EEO efforts began in 1967 when the Office of Communication of the United Church of Christ petitioned the Commission to prohibit stations that had engaged in employment discrimination from holding a license. In response, the Commission announced a new policy requiring broadcast licensees to show nondiscrimination in their employment practices.¹ The Commission recognized, as articulated by the Civil Rights Act of 1964, the national policy against employment discrimination on the basis of race, religion, sex, or nationality and that deliberate discrimination would be inconsistent with the responsibility of each broadcaster to serve all elements of the community.

In further explaining the basis for its new policy, the FCC cited the Kerner Report which was the federal government's first official written document concluding that racism existed and that it was a problem. The report cited the mass media's failure to foster interracial communications as one of the causes of the 1960's civil disturbances and found that the media had not shown an appreciation of Black culture or history, had not employed or trained enough Blacks in decision-making positions and recommended that television develop programming integrating Blacks in order to foster positive race relations.

¹ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766 (1968)

In 1969, the FCC adopted rules requiring equal opportunity in the employment practices of broadcast licensees.² The Commission required stations to establish, maintain, and carry out a continuing program of specific practices designed to assure equal employment opportunity in every aspect of station employment; and that EEO programs address issues such as program dissemination, recruitment, managerial accountability and self-evaluation. The Commission stated that a formal EEO rule was necessary to emphasize its policy, make it specific, and provide remedies for noncompliance. The Commission also reiterated the bedrock principle that discriminatory employment practices are incompatible with the operation of a station in the public interest.

A year later, the Commission refined its EEO rules and instituted reporting requirements.³ These rules required each licensee with five or more full-time employees to submit with its renewal application a written equal employment opportunity program designed to ensure nondiscrimination in station recruitment, hiring, placement and promotion. The Commission also adopted a rule requiring each licensee with five or more full-time employees to file an annual statistical profile report, known as FCC Form 395. The Commission explained that these changes would provide useful statistical data and ensure that licensees focused on the best method of assuring effective equal employment practices.

² *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 FCC 2d 240 (1969)

³ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430 (1970)

Later years saw the extension of the rules to include gender,⁴ and to cover the cable industry.⁵ The Commission fine-tuned its program as it developed experience in this area, most notably by entering into a 1978 Memorandum of Understanding with the EEOC outlining the jurisdictions of each agency in handling complaints of discrimination against licensees, thus avoiding regulatory duplication.⁶

In 1994, the Commission designated for hearing the license renewal applications of the Lutheran Church/Missouri Synod for failing to recruit minorities and for possible misrepresentation or lack of candor.⁷ Among other things, the licensee explained that it had not recruited minorities because its station employees required classical music expertise. Ultimately, the Commission fined the licensee \$25,000 for allegedly misrepresenting whether classical music expertise was a job requirement.

⁴ *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342, and adding the Equal Employment Program and Filing Requirement to Commission Rules 73.125, 73.301, 73.599, 73.680 and 73.793*, 32 FCC 2d 708 (1971).

⁵ *Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices*, 34 F.C.C.2d 186 (1972).

⁶ *Memorandum of Understanding between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978).

⁷ *Applications of the Lutheran Church/Missouri Synod for Renewal of Licenses of Stations KFUD/KFUD-L, McClayton, Missouri*, 9 FCC Red 914 (1994).

The licensee appealed the FCC's decision to the U.S. Court of Appeals for the D.C. Circuit. In 1998, the court ruled that the outreach provisions of the broadcast EEO rule were unconstitutional and vacated other aspects of the FCC's order.⁸ The court held that the FCC's internal processing guidelines, which compared a station's minority and female employment to minority and female representation in the local labor force, pressured licensees to hire minorities. In response, the Commission adopted new EEO rules for the broadcasting and cable industries to provide them with significant flexibility and control over the development of their outreach programs.⁹ Upon review, the court eventually affirmed the Commission's statutory authority for its new EEO outreach rules, but found unconstitutional one of the provisions designed to achieve broad outreach.¹⁰

That brings us to where we are today. Last December, the Commission sought comment on a proposal for new EEO rules.¹¹ The Commission reiterated its commitment to prohibiting discrimination in broadcast and cable employment, and to requiring broadcasters and cable entities to reach out to all segments of the community when filling vacancies.

⁸ *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied*, 154 F.3d 487, *pet. for reh'g en banc denied*, 154 F.3d 494 (D.C. 1998).

⁹ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Red 2329 (2000).

¹⁰ *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, *reh'g denied* 253 F.3d 732 (D.C. Cir. 2001).

¹¹ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 16 FCC Red 22843 (2001).

It is against the backdrop of these court decisions that you and the panelists here today must craft new rules that will pass judicial muster. I have every confidence that you and the institution are up to this challenge.

And, now, before I go, I want to offer a few words of praise for the Commission's sometimes underappreciated, usually undercompensated and always underestimated staff. I like to think that the Commission's staff is the smartest, most capable, and most creative of any federal agency. Its integrity and commitment to developing, explaining and enforcing the agency's regulations is unparalleled. Its hard work will be invaluable as the agency strives to meet the challenges you face in this area.

Thank you, again, for the opportunity to be a part of this historic event.